

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
625 BROADWAY
ALBANY, NEW YORK 12207

In the Matter

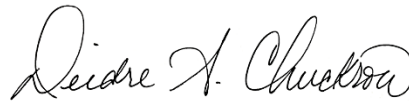
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the Application of FINGER LAKES INDUSTRIAL CONTRACTING CORP.
for Certification as a Woman-Owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 50594

RECOMMENDED ORDER

-by-



Deidre A. Chuckrow
Administrative Law Judge
October 1, 2024

This matter considers the appeal by Finger Lakes Industrial Contracting Corp. (“Finger Lakes” or “applicant”) pursuant to New York State Executive Law Article 15-A and Title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York (5 NYCRR) parts 140-144, challenging the determination of the Division of Minority and Women’s Business Development (“Division”) of the New York State Department of Economic Development (“DED”) that the business enterprise does not meet the eligibility criteria for certification as a woman-owned business enterprise (“WBE”).

PROCEDURAL HISTORY

1. On September 30, 2022, Finger Lakes applied for recertification as a woman-owned business enterprise (“WBE”). Finger Lakes based its application on Ms. Melissa Morganti. (DED Exhibit 1).
2. On August 17, 2023, the Division denied the application on the following grounds (DED Exhibit 7):
 - a. The minority group members or women relied upon for certification do not possess adequate, industry-specific competence to make critical business decisions without relying upon other persons as required under 5 NYCRR § 144.2(c)(1); and
 - b. The minority group members or women relied upon for certification do not make operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise, as required under 5 NYCRR § 144.2(c)(2).(DED Exhibit 2).
3. Finger Lakes submitted a request to appeal via hearing, dated August 18, 2023. (DED Exhibit 3).
4. A Notice of Hearing was sent to all parties on March 29, 2024 (DED Exhibit 4).

5. A hearing was held and concluded on August 27, 2024.

FINDINGS OF FACT

6. Finger Lakes is engaged in the business of providing commercial welding, diving, and metal fabrication services. (DED Exhibit 2).
7. Ms. Morganti is the woman owner relied upon for certification and is the President and 100% owner of the applicant business. (DED Exhibits 1 and 2).
8. The critical functions of Finger Lakes include estimating construction and diving costs, reading blueprints, bidding, negotiating contracts, supervising and managing field staff, and directing day-to-day operations. All the contracts submitted with the application were signed by Ms. Morganti. (DED Exhibits 1, 2, 7-9; 12-15; Hearing Testimony of Mr. Abdul Karim Bah).
9. Finger Lakes operates a commercial surface supplied air diving construction business. A dive team must be comprised of at least three members, including the diver, a “tender,” and a communications person. Welding work requires both a welder and a “fire watch.” (APP Exhibit C; Hearing Testimony of Ms. Morganti)
10. Hiring by the applicant business is done pursuant to the collective bargaining agreement, of which Finger Lakes is a member. Field management is also governed by the collective bargaining agreement. (APP Exhibit I; Hearing Testimony of Ms. Morganti).
11. Ms. Morganti obtains the contracts, bids on and negotiates the contracts, handles all staffing needs, manages and runs the office, visits sites to conduct safety inspections and supervise, and works on site as part of a crew when needed. Ms. Morganti has an OSHA 10 certification and completed the NYS boater’s safety training. She has over 30 years of experience in office management. Ms. Morganti is involved in all aspects of the business with the exception of diving and welding. (DED Exhibit 5; Hearing Testimony of Ms. Morganti).

12. Ms. Morganti's husband, Frederick Morganti Jr. is employed by the business as the Project Superintendent. He graduated from the Divers Academy of the Eastern Sea Board in 1991 and has over 30 years of experience in the commercial diving industry. He is a member of Millwrights, Pile Drivers and Divers Local 1163, is a certified rigger, a NYS DOT certified welder, has an OSHA 30 certification, and has been an active commercial diver since 1991. Mr. Morganti supervises on-site productions and assists with project estimates for the applicant business. (DED Exhibit 6; Hearing Testimony of Ms. Morganti).
13. Ms. Morganti works with Mr. Morganti on bids for the applicant business. Ms. Morganti reviews the projects, works up a price based on labor rates and material costs and has Mr. Morganti review the bid to determine what materials and equipment are needed. (Hearing Testimony of Ms. Morganti).

APPLICABLE LAW

5 NYCRR § 144.2 (c)(1) states as follows:

Competence in the industry. Minority group members and women relied upon for certification must possess adequate, industry-specific competence to make critical business decisions without relying upon other persons. This requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things. In evaluating whether a minority group member or woman possesses adequate, industry-specific competence, the division shall consider factors including but not limited to:

- (i) Whether individuals employed by the business enterprise for which certification is sought are required to obtain licenses or certifications to provide products or services to the clients of the business enterprise;
- (ii) The extent to which academic credentials exist for persons employed in the industry; and
- (iii) The extent to which industry-specific expertise may be obtained via direct work experience.

5 NYCRR § 144.2 (c)(2) states as follows:

Operational decisions. Minority group members and women relied upon for certification must make operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise for which certification is sought. The critical functions of a business enterprise shall be determined by the division based upon the following factors, but is not limited to:

- (i) The products or services the business enterprise provides to clients; and
- (ii) The means by which the business enterprise obtains contracts or orders.

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proof to establish that Division staff's determination to deny the application filed by Finger Lakes for recertification as a WBE is not supported by substantial evidence (*see* State Administrative Procedure Act § 306[1]). The substantial evidence standard "demands only that a given inference is reasonable and plausible, not necessarily the most probable," and applicant must demonstrate that Division staff's conclusions and factual determinations are not supported by "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." *Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011]).

The review is limited to such information that was before the division at the time of the denial determination (5 NYCRR 145.2(b)(1)). Evidence that seeks to clarify and explain previously submitted materials will be considered, however new evidence will not be considered. See *Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021).

DISCUSSION

Ms. Melissa Morganti, President and owner of Finger Lakes, appeared at the hearing on behalf of the applicant business. Ms. Morganti testified on behalf of Finger Lakes and offered the

following exhibits which were admitted into evidence: APP Exhibits A, B, C, D, E, F, and I. All of the applicant's admitted exhibits were objected to by the Division, and admitted over those objections as clarifying information already before the Division, pursuant to *Scherzi Systems*, supra.

Ms. Dennie Byam, Esq., Appeals Counsel, Empire State Development, appeared at the hearing on behalf of the Division. The following witness testified on behalf of the Division: Abdul Karim Bah, Associate Certification Analyst, Division of Minority and Women's Business Development. The Division offered the following exhibits which were admitted into evidence: DED Exhibits 1 through 15.

I. Prior Certification

The Division acknowledges that Finger Lakes was previously certified as a woman-owned business enterprise. The Division asserts that it is not bound to recertify a WBE if its prior determinations were made in error. The Division argues that based on the application and supplemental material submitted by applicant, Division staff correctly determined that applicant was not eligible for recertification.

The Division is correct that it is not obligated to certify Finger Lakes based on its prior determinations. It is well settled that the doctrine of equitable estoppel cannot, as a general rule, be invoked against a governmental agency in the exercise of its governmental function. See *Matter of Daleview Nursing Home v. Axelrod*, 62 NY2d 30 (1984); *Matter of Atlantic States Legal Found., Inc. v. New York State Dept. of Environmental Conservation*, 119 AD3d 1172 (2014).

With the expiration of its certification, Skywave had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR §144.2 when it submitted the September 30, 2022, application and supporting materials and cannot rely on the past determinations of the Division.

II. Industry-Specific Competence and Day-to-Day Operations

The Division denied Finger Lakes's application for certification as a WBE on the basis that the applicant failed to demonstrate that Ms. Morganti possesses adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required by 5 NYCRR § 144.2(c)(1) and that the applicant failed to demonstrate that she makes operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise as required by 5 NYCRR § 144.2(c)(2). (DED Exhibit 2). As many of the facts used to support the Division's denial are the same, and as some of the criteria for denial overlap, they will be addressed collectively.

The Division interprets these regulations to require an applicant to demonstrate that the owner, relied on for certification, has the working knowledge necessary to review or evaluate the work of more experienced employees. (See *In the Matter of Upstate Electrical, LLC v New York State Department of Economic Development*, 179 AD3d 1343 (3d Dept. 2020) citing to *C.W. Brown, Inc. v Canton*, 216 AD 841, 842 (1995) (where the Court affirmed the denial where the owner had no training or experience in the industry to make her qualified to supervise the work of her employees.)) The Division consistently requires that owners be able to perform the core revenue generating functions of the business enterprise. (See *Matter of Bore Tech LLC*, Recommended Order dated June 1, 2021 ;Final Order 21-05, dated December 22, 2021), see also, *Matter of Occupational Safety & Environmental Assoc. Inc. v New York State Department of Economic Development*, 161 AD3d 1582 (3d Dept. 2019). Expertise or experience in office management or general business administration will not satisfy these requirements. (5 NYCRR § 144.2(c)(1)). In considering 5 NYCRR § 144.2(c)(1), regarding industry-specific competence, the Division shall consider:

- (i) Whether individuals employed by the business enterprise for which certification is sought are required to obtain licenses or certifications to provide products or services to the clients of the business enterprise;
- (ii) The extent to which academic credentials exist for persons employed in the industry; and
- (iii) The extent to which industry-specific expertise may be obtained via direct work experience.

The regulation under 5 NYCRR 144.2(c)(2) provides that in determining whether a person relied on for certification makes critical business decisions on a day-to-day basis without relying on others, the critical functions of the business enterprise shall be determined by the Division based upon, but not limited to, the following factors: (1) “The products or services the business enterprise provides to clients; and” (2) “The means by which the business enterprise obtains contracts or orders.” 5 NYCRR § 144.2 (c)(2). The Division consistently denies certification where the owner has no training, experience, or working knowledge in the core business functions and other employees or owners have more significant or substantive experience, and exercise that experience, such as by supervising or controlling field operations. (*Matter of Panko Electrical and Maintenance Corp. v Zapata et. al*, 172 AD3d 1682 (3d Dept. 2019), see also *Matter of Upstate Electrical, supra*).

The Applicant bears the burden of establishing that the minority group member relied upon for certification has met this requirement. Failure to satisfy this burden is proof that the denial was supported by substantial evidence. See *A.A.C. Contracting, Inc. v. NYS Dept. of Economic Development*, 195 A.D. 3d 1284, 151 NYS 3d 187 (3d Dept. 2021).

Applicant argued that Ms. Morganti has been in the construction business for between 20 and 30 years, and that she is involved in all aspects of the business with the exception of doing the diving and underwater work.. Applicant stated that Ms. Morganti is involved in all aspects of the

business, from obtaining contracts through the execution of the contract and is on site as part of the crew for many of the projects conducted by Finger Lakes. Applicant asserts that Ms. Morganti has the competence and experience in the industry to make critical business decisions and that she makes day-to-day operational decisions for the business enterprise. Applicant concedes that prior certifications by the Division are not considered but does note the business' prior certification was based on factors that have not changed. (Hearing Testimony of Ms. Morganti)

The Division argued that the applicant failed to provide sufficient evidence to establish that Ms. Morganti possesses adequate industry-specific competence to make critical business decisions without relying on others. The Division asserts that Ms. Morganti's experience and work for the applicant business is in the administrative functions of the business, and that she has no training or experience in the critical functions of the business, namely diving. Instead, Ms. Morganti's husband, Mr. Frederick Morganti, Jr. has the industry-specific competence, and that Ms. Morganti relies on him for critical business decisions.

Ms. Morganti testified that she is, and has been since 2006, the President and owner of the applicant business, which she began using her knowledge and experience in the construction business and by obtaining knowledge of the welding, fabrication, and diving industry "through various acquaintances." (DED Exhibit 5; Hearing Testimony of Ms. Morganti). Ms. Morganti stated that she obtains the contracts, bids on the contracts, negotiates the contracts, and signs the contracts entered into by Finger Lakes. (DED Exhibits 5, 7, 8, 9, 12, 13, and 14; Hearing Testimony of Ms. Morganti). The applicant business engages in underwater construction involving surface supplied air diving, which requires a three-person crew including a diver, tender, and communications person, with only the diver requiring a certification. (Hearing Testimony of Ms. Morganti). Ms. Morganti testified that she has served as both a tender and communications crew

member for the applicant business but has never served as a diver. (Hearing Testimony of Ms. Morganti). Welding jobs require both a welder and a fire watch, and Ms. Morganti has served as a fire watch, but not as a welder on projects for Finger Lakes. (Hearing Testimony of Ms. Morganti).

Ms. Morganti testified that to work as a commercial diver an individual must either have completed dive school or have union approved diving experience. Licensure is not required for divers, and different companies have different requirements for their divers.. The only requirement is an OSHA card and a physical, and that the individual meets the requirements as set by the union.. The applicant business hires through their collective bargaining agreement. Ms. Morganti has no training or experience as a diver, or as a welder, but has experience and has worked as a tender, communications person, and fire watch on jobs for the applicant business. Ms. Morganti has an OSHA 10 card and has taken the NYS boaters safety course. (DED Exhibit 5; APP Exhibit B; Hearing Testimony of Ms. Morganti).

Mr. Morganti is an experienced commercial diver, completed a diving program in 1991, is a certified rigger and welder, has an OSHA 30 card, and has worked as a project superintendent for the applicant business since 2001. (DED Exhibit 6). Mr. Morganti works as a diver, welder, field supervisor and superintendent, and assists by determining what materials and equipment are needed for projects. (DED Exhibit 6; Hearing Testimony of Ms. Morganti). Mr. Morganti does not acquire contracts for the applicant business, but does assist with the bidding process, and both manages and conducts field operations, including underwater and welding work. (Ded Exhibit 6; Hearing Testimony of Ms. Morganti).

Mr. Abdul Karim Bah, is an Associate Certification Analyst for the Division and has worked for the Division for fourteen years.. Mr. Bah was the analyst assigned to review the

applicant business' re-certification application.. Mr. Bah testified that the applicant business is involved in the commercial diving industry, and that the information regarding the services conducted by Finger Lakes came from the application and from the contracts submitted with the application. (DED Exhibits 1, 7-9; 12-15; Hearing Testimony of Mr. Bah). The scope of work listed on the contracts submitted evidences that the work conducted by Finger Lakes requires a diver. (DED Exhibits 7-9; 12-15; Hearing Testimony of Mr. Bah).

Mr. Bah testified that nothing in the application or in the supporting materials submitted with the application provide any evidence that Ms. Morganti possesses adequate industry specific competence to make critical business decisions without relying on others. (Hearing Testimony of Mr. Bah). Ms. Morganti holds no academic credentials relating to the critical functions of the business, she holds no licenses or certifications, nor has any experience or training in diving or welding, the critical function of the business enterprise. (DED Exhibits 1, 5; Hearing Testimony of Ms. Morganti; Hearing Testimony of Mr. Bah). However, Mr. Morganti, the non-qualifying employee, has the education, certifications, training, and experience in both diving and welding. (DED Exhibit 6; Hearing Testimony of Ms. Morganti; Hearing Testimony of Mr. Bah). Further, while Ms. Morganti has experience serving on a dive team, and acting as a fire watch, she has no experience working underwater, an essential component to the business enterprise's work. (DED Exhibit 5; Hearing Testimony of Ms. Morganti).

Ms. Morganti's experience is in HR management, accounting, and contract negotiations, all work that is administrative in scope, and therefore, does not qualify as adequate industry-specific competence. (DED Exhibit 5; Hearing Testimony of Ms. Morganti). By contrast, Mr. Morganti has a lengthy work history and certifications in commercial diving industry, which includes acting as a project superintendent, underwater work, and welding, all critical business

functions of the applicant business. (DED Exhibit 6; Hearing Testimony of Ms. Morganti; Hearing Testimony of Mr. Bah). Based on the information regarding Mr. Morganti's background, and the information provided with the application, the Division determined that Ms. Morganti's experience and competence was in office administration and finance, and that she does not possess adequate industry-specific competence, and instead relies on other employees, including her husband, to make critical business decisions. (DED Exhibit 2; Hearing Testimony of Mr. Bah).

The contracts submitted with the application, which evidence the nature of the work engaged in by the applicant business, while signed by Ms. Morganti, list specific work requirements which Ms. Morganti is not qualified to engage in. (Hearing Testimony of Mr. Bah; DED Exhibits 7-9; 12-15). In addition, nothing in the information provided to the Division by the applicant demonstrates any involvement in the critical functions of the business. (Hearing Testimony of Mr. Bah). Ms. Morganti's duties and responsibilities are administrative and do not involve the critical functions of the applicant business, as such she must rely on others to make operational decisions on a day-to-day basis. (DED Exhibit; Hearing Testimony of Mr. Bah).

Where the owner relied upon for certification has no training or experience in the critical functions of the business enterprise and others, with more significant experience, such as an employee or non-qualifying owner, actively engage in the core functions of the business, denial based on lack of operational control is appropriate. (See *Matter of Panko, supra*, and *Matter of Upstate Electrical, supra*). Here, the evidence presented establishes that although Ms. Morganti has experience serving on a dive team, and acting as a fire watch, the majority of Ms. Morganti's role at Finger Lakes is administrative in nature while others, namely Mr. Morganti, not relied on for certification, are responsible for the day-to-day operations of the business enterprise.

Based on the foregoing, I find that the Division's determination that Finger Lakes has not demonstrated that the woman owner relied upon for certification possesses adequate industry competence without relying on others and makes operational business decisions as to the critical functions of the applicant business, as required under 5 NYCRR §§ 144.2(c)(1) and (2) is supported by substantial evidence.

CONCLUSION

Finger Lakes did not meet its burden to demonstrate that the Division's determination to deny its application for certification as a woman-owned business enterprise with respect to the eligibility criteria at 5 NYCRR §§ 144.2(c)(1), and 144.2(c)(2) was not based on substantial evidence.

RECOMMENDATION

The Division's determination to deny Finger Lakes' application for certification as a woman-owned business enterprise should be affirmed.

In the Matter of Finger Lakes Industrial Contracting Corp.
DED File ID No. 50594
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Letter of Explanation and Exhibit List	Y	Y
APP B	Melissa Morganti OSHA Card	Y	Y
APP C	OSHA Chapter 1910	Y	Y
APP D	Quick Books Information	Y	Y
APP E	Construct Connect Subscription Info	Y	Y
APP F	NYS Contract Reports Info	Y	Y
APP G	Other WBE Certifications	Y	N
APP H	MWBE Certification Notification	Y	N
APP I	Union Membership Information	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Determination	Y	Y
DED 3	Appellant's Appeal Letter	Y	Y
DED 4	Notice of Hearing	Y	Y
DED 5	Melissa Morganti Resume	Y	Y
DED 6	Frederick Morganti Resume	Y	Y
DED 7	Ramboll Americas Engineering Solutions Contract (10/11/2021)	Y	Y
DED 8	Trevcon Construction Company, Inc. Contract (10/1/2021)	Y	Y

DED 9	D'Onofrio General Contractors Corp. Contract (8/29/2019)	Y	Y
DED 10	Certification Application Affidavit (5 pages)	Y	Y
DED 11	Certification Application Affidavit (2 pages)	Y	Y
DED 12	D'Onofrio General Contractors Corp. Contract (11/19/2020)	Y	Y
DED 13	Batter Park City Authority Contract (1/31/2021)	Y	Y
DED 14	NYPA Niagara Anchor Cable Inspection Contract (7/19/2021)	Y	Y
DED 15	City of Auburn Contract (3/20/2020)	Y	Y